

FIRST REGULAR SESSION

HOUSE BILL NO. 759

97TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES JONES (50) (Sponsor), DIEHL, RICHARDSON,
HUMMEL AND WEBBER (Co-sponsors).

1798L.011

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal sections 407.400 and 407.413, RSMo, and to enact in lieu thereof two new sections relating to alcohol franchise.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 407.400 and 407.413, RSMo, are repealed and two new sections
2 enacted in lieu thereof, to be known as sections 407.400 and 407.413, to read as follows:

407.400. As used in sections 407.400 to 407.420:

2 (1) "Franchise" means a written or oral arrangement for a definite or indefinite period,
3 in which a person grants to another person a license to use a trade name, trademark, service
4 mark, or related characteristic, and in which there is a community of interest in the marketing of
5 goods or services at wholesale, retail, by lease, agreement, or otherwise[, including] ;
6 **"franchise" specifically includes, but is not limited to, a commercial relationship of definite**
7 **duration or continuing indefinite duration, between a "wholesaler", such wholesaler being a**
8 **person as defined in this section, licensed pursuant to the provisions of chapter 311 to sell at**
9 **wholesale, intoxicating liquor, as defined in section 311.020, to retailers, duly licensed in this**
10 **state, and a "supplier", being a person engaged in the business as a manufacturer, distiller,**
11 **rectifier or out-of-state solicitor whose brands of intoxicating liquor are distributed through duly**
12 **licensed wholesalers in this state, and wherein a wholesaler is granted the right to offer, sell, and**
13 **distribute within this state or any designated area thereof such of the supplier's brands of**
14 **intoxicating liquor, or all of them, as may be specified, with or without the grant of a license**
15 **to use a trade name, trademark, service mark, or related characteristic, and whether or not**
16 **there is a community of interest in the marketing of goods or services;** except that, the term

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

17 "franchise" shall not apply to persons engaged in sales from warehouses or like places of storage,
18 other than wholesalers as above described, leased departments of retail stores, places of original
19 manufacture, nor shall the term "franchise" apply to a commercial relationship that does not
20 contemplate the establishment or maintenance of a place of business within the state of Missouri.
21 As used herein "place of business" means a fixed, geographical location at which goods, products
22 or services are displayed or demonstrated for sale. **It is the general assembly's intent to make**
23 **clear that this subdivision was correctly interpreted as set forth in the Missouri cases of**
24 **High Life Sales Company v. Brown-Forman Corporation, 823 S.W. 2d 493 (Mo. 1992) and**
25 **Brown-Forman Distillers Corp. v McHenry, 566 S.W. 2d 194 (Mo. 1978), rather than in**
26 **Missouri Beverage Company, Inc. v. Shelton Brothers, Inc., 796 F. Supp. 2d 988 (W.D. Mo.**
27 **2011), aff'd. 11-2456 (8th Cir. February 28, 2012). Further, the general assembly declares**
28 **that this subdivision was not correctly interpreted in Missouri Beverage Company, Inc. v**
29 **Shelton Brothers, Inc., 796 F. Supp 2d 988 (W.D. Mo. 2011), aff'd 11-2456 (8th Cir.**
30 **February 28, 2012);**

31 (2) The term "goods" includes any personal property, real property, or any combination
32 thereof;

33 (3) The term "other property" includes a franchise, license distributorship, or other
34 similar right, privilege, or interest;

35 (4) The term "person" includes an individual, corporation, trust, estate, partnership,
36 unincorporated association, or any other legal or commercial entity;

37 (5) The term "pyramid sales scheme" includes any plan or operation for the sale or
38 distribution of goods, services or other property wherein a person for a consideration acquires
39 the opportunity to receive a pecuniary benefit, which is not primarily contingent on the volume
40 or quantity of goods, services, or other property sold or distributed or to be sold or distributed
41 to persons for purposes of resale to consumers, and is based upon the inducement of additional
42 persons, by himself or herself or others, regardless of number, to participate in the same plan or
43 operation; and

44 (6) The term "sale or distribution" includes the acts of leasing, renting or consigning.

407.413. 1. If more than one franchise for the same brand or brands of intoxicating
2 liquor is granted to different wholesalers in this state, it is a violation of sections 407.400 to
3 407.420 for any supplier to discriminate between the wholesalers with respect to any of the
4 terms, provisions, and conditions of these franchises.

5 2. Notwithstanding the terms, provisions and conditions of any franchise, no supplier
6 shall unilaterally terminate or refuse to continue or change substantially the condition of any
7 franchise with the wholesaler unless the supplier has first established good cause for such
8 termination, noncontinuance or change. **This subsection does not apply to a "supplier", being**

9 a person engaged in the business as a manufacturer, distiller, rectifier, or out-of-state
10 solicitor whose brands of intoxicating liquor are distributed through duly licensed
11 wholesalers in this state who sells less than two thousand five hundred cases of distilled
12 spirits in the state, or who sells less than ten thousand cases of wine in the state, the volume
13 thresholds being measured for the twelve months immediately preceding the date on which
14 the wholesaler receives notice of the termination, noncontinuance, or change, provided
15 such supplier shall be obligated nevertheless, prior to the effective date of the termination,
16 noncontinuance, or change, to pay to the wholesaler an amount equal to the fair market
17 value of the distribution rights which will be lost or diminished by reason of the
18 termination, noncontinuance, or change, including without limitation the actual laid in cost
19 of any inventory on hand, and provided further that this exception shall only apply to a
20 termination, noncontinuance or change concerning the category of intoxicating liquor
21 (namely, distilled spirits or wine) that is less than the volume threshold set forth in this
22 sentence. The exception in the preceding sentence shall not affect a supplier's obligation
23 to satisfy the notice requirements set forth in section 407.405. For purposes of this
24 subsection, "fair market value" shall be determined in accordance with the provisions of
25 the written agreement, if any, between the supplier and wholesaler, or if the written
26 agreement between them does not specify how fair market value is determined, then:

27 (1) For a supplier of wine who sells less than one thousand cases of wine in the state
28 in the twelve months immediately preceding the date on which the wholesaler receives
29 notice of the termination, noncontinuance, or change, "fair market value" shall be equal
30 to the actual laid in cost of any inventory on hand plus two times the gross profit earned
31 by the wholesaler in the twelve month period preceding the notice or twelve times the
32 monthly average gross profit for the period of time the wholesaler served as a distributor
33 for the supplier's products if such time period is less than twelve months, and "gross
34 profit" shall mean net revenue less costs of goods sold, as calculated in accordance with
35 generally accepted accounting principles; and

36 (2) For a supplier of wine who sells at least one thousand cases but less than ten
37 thousand cases of wine in the state in the twelve months immediately preceding the date
38 on which the wholesaler receives notice of the termination, noncontinuance, or change, and
39 for a supplier of distilled spirits that sells less than two thousand five hundred cases of
40 distilled spirits in the state in the twelve months immediately preceding the date on which
41 the wholesaler receives notice of the termination, noncompliance, or change, "fair market
42 value" shall be determined by agreement of the supplier and wholesaler, but if the parties
43 cannot so determine within thirty days after the notice, then the matter shall be submitted
44 to mandatory arbitration before a panel of three neutral arbitrators conducted pursuant

45 **to chapter 435 or the Federal Arbitration Act if the latter so applies, with the parties to the**
46 **arbitration each to bear their own attorneys' fees and costs of the arbitration.**

47 3. Any wholesaler may bring an action in a court of competent jurisdiction against a
48 supplier for violation of any of the provisions of this section and may recover damages sustained
49 by such wholesaler together with the costs of the action and reasonable attorney's fees.

50 4. In any action brought by a wholesaler against a supplier for termination,
51 noncontinuance or substantial change in violation of the provisions of this section, it is a
52 complete defense for the supplier to prove that the termination, noncontinuance or change was
53 done in good faith and for good cause.

54 5. As used in this section, "good faith" is the duty of each party to any franchise and all
55 officers, employees or agents thereof to act in a fair and equitable manner towards each other,
56 and "good cause" means the following:

57 (1) Failure by the wholesaler to comply substantially with the provisions of an agreement
58 or understanding with the supplier, which provisions are both essential and reasonable;

59 (2) Use of bad faith or failure to observe reasonable commercial standards of fair dealing
60 in the trade; or

61 (3) Revocation or suspension for more than thirty-one days of a beer wholesaler's federal
62 basic permit or of any state or local license required of a beer wholesaler for the normal operation
63 of its business.

64 6. As to brewers and beer wholesalers, the provisions of this section shall only apply to
65 agreements entered into on or after August 28, 1998, and to agreements which are renewed or
66 substantially amended on or after August 28, 1998. As used in the preceding sentence,
67 "substantially amended" means a written amendment that materially alters the fundamental
68 business relationship between brewer and wholesaler. "Substantially amended" does not include
69 changes or amendments that are contemplated in writing by the parties to an agreement.

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